adopt as a matter of law, but rather a question for the jury in each individual case, as was held above: *Railroad Co.* v. *Pollard*, 22 Wall. 341; *Nichols* v. *Sixth Avenue Railroad Co.*, 39 N. Y. 131.

In *Gee* v. *The Metropolitan Railway Co.*, Law Rep. 8 Q. B. 161, a passenger on the under-ground railway in London left his seat while the train was in full motion, went to the door window, across which there was a brass rod to prevent passengers from putting their heads and arms out, and placed his hand on the rod for the purpose of looking out to see the signal lights and show them to a fellow passenger. The door flew open and he fell out. It was held that there was no contributory negligence, COCKBURN, C. J., saying: "The passenger did nothing more than was within the scope of his enjoyment while travelling without committing any imprudence. In passing through a beautiful country he is certainly at liberty to stand up and look at the view in the ordinary manner of people travelling for pleasure." And MELLOR, J., said: "I do not agree with the defendant's counsel that a passenger must sit still throughout the journey."

This was the principal argument of the company in *Barden's Case*: that as the carrier was bound by law to furnish each passenger with a seat, there was the correlative duty on his part to occupy it the entire journey, or if he left it, except for cases of health, necessity, &c., he did so at his peril; but the court expressly deny such a conclusion to follow from the admitted premise.

Besides, there was one more element in *Barden's Case*, which might be entitled to some weight, and that is, that he did not arise fron his seat until after the servants of the company had announced the station to which he was bound, and according to the opinion of many this itself constitutes an invitation to alight, and an assurance from the company that he may safely do so. See *Weller* v. *London, Brighton & South Coast Railway Co.*, Law Rep. 9 C. P. 126; *Praeger* v. *Bristol & Exeter Railway Co.*, 24 L. T. (N. S.) 105; *Robson* v. *The North Eastern Railway Co.*, Law Rep. 10 Q. B. 271; *Foy* v. *London, Brighton & South Coast Railway Co.*, 18 C. B. N. S. 225.

Thus we have two classes of cases, in one of which the question of contributory negligence is one of law, and in the other, one of fact. There remains an intermediate one. A passenger commences to enter a train while stationary. With one foot on the step of the car and one on the platform of the station, he stops to converse with a friend, and while in that situation the train starts. In attempting to get on after the train is in motion he is thrown under the car wheel and injured. Is it a question of law for the court, or of fact for the jury, whether he was negligent in thus persisting in his attempt? It was recently ruled in Massachusetts upon that exact state of facts that it was solely for the jury: *Warner* v. *The Old Colony Railroad Co.*, Bristol Co., April term 1876.

EDMUND H. BENNETT.

Supreme Court of Pennsylvania.

W. H. WOODS *v.* JAMES NORTH ET AL.

A clause in a promissory note allowing a commission upon its face, as a collection-fee, in case of its non-payment at maturity, renders the note uncertain and destroys its negotiability.

A promissory note in the usual form contained, immediately after the amount, the words "and five per cent. collection-fee if not paid when due." In an action

by the holder against the endorser: *Held*, that the note was not negotiable, and that defendant was therefore not liable as an endorser of negotiable paper.

Semble, the five per cent. for collection is not liquidated damages which would pass to the holder absolutely, but is a penalty to cover a reasonable compensation to an attorney in case the note has to be collected by legal proceedings.

ERROR to the Common Pleas of Huntingdon county.

Debt by James North *et al.*, trading as the Union Bank of Huntingdon, against Woods as endorser of the following promissory note:—

$377 Huntingdon, Pa., May 5th 1875.

Sixty days after date I promise to pay to the order of W. H. Woods, at the Union Bank of Huntingdon, three hundred and seventy-seven dollars, and five per cent. collection-fee if not paid when due, without defalcation, value received.

No. 14,915. Due July 7th. SAMUEL STEFFEY.

[Endorsed] W. H. WOODS.

I waive protest, demand and notice of non-payment on the within note, July 7th 1875.

W. H. WOODS.

Defendant pleaded *nil debet*, and subsequently payment, with leave, &c., and a special plea of usury.

Upon the trial of the case, the plaintiffs offered in evidence the note sued on, which was objected to by the defendant on the ground that the plaintiffs had declared as the holders of a negotiable promissory note against its endorser, whilst the note offered was not negotiable because the collection clause contained in it rendered it uncertain and contingent. Objection overruled, note admitted, and exception sealed for defendant.

The defendant presented certain points for the instruction of the jury, which, with the answers of the court thereto, were as follows:—

1. That under the evidence in this case the plaintiffs are not entitled to recover. *Answer.* We refuse to instruct you as requested in this point, but instruct you directly the reverse, that they have a right to recover whatever may be due upon this debt.

2. That if the court refuse to instruct the jury as prayed for in the first point, then the defendant asks the court to instruct the jury that the defendant is not liable to pay the five per cent. for collection. *Answer.* We refuse to so instruct you. The contract in the note was, that if it was not paid at maturity, the maker, Steffey, would pay five per cent. additional for collection-fee. And

Mr. Woods endorsed that contract and made himself liable to pay it if Steffey did not.

The court further charged the jury, *inter alia*, as follows:—

"It is urged on the part of the defendant that the addition of these words '*five per cent. collection-fee if not paid when due*' destroys the negotiable character of this note, and relieves him from any liability upon it as an endorser. We instruct you, as matter of law, that the addition of these words does not destroy the negotiability of the note, and it does not release Mr. Woods, the defendant, from his liability as an endorser upon it."

Defendant excepted to the answers to the first and second points, and to that part of the charge above set forth. Verdict and judgment for plaintiffs. Defendant took this writ, assigning as error the admission of the note in evidence, the answers to his points, and so much of the charge as is above set forth.

Woods, p. p., and *Williamson*, for plaintiff in error.—A promissory note must be certain and unconditional: Story on Prom. Notes 1. If it be uncertain in amount, or accompanied by other words that increase or diminish it according to circumstances, it is void as a promissory note: Story on Bills, § 42; Byles on Bills, p. 162; *Patterson* v. *Poindexter*, 6 W. & S. 227; *Overton* v. *Tyler*, 3 Barr 346; *Sweeney* v. *Thickstun*, 27 P. F. Smith 131; *Ayrey* v. *Fearnsides*, 4 M. & W. 168; *Fralick* v. *Norton*, 2 Mich. 130.

Absolute certainty is required, and the rule *id certum est quod certum reddi potest* does not apply.

That the present note is variable admits of no doubt, inasmuch as it may be more or less according to the time of its payment—less if paid at maturity, more when suit is brought.

In any event, the endorser is not liable for the collection-fee. His endorsement, as regards this, is similar to that of an endorser of a note containing a waiver of the exemption; the waiver binding the maker alone. Again, the collection clause in this note is only binding on the maker when steps are taken towards its collection from him, and expenses are incurred thereby. To permit its collection, in addition to the interest, simply because of the non-payment of the note at maturity, would be throwing but a thin veil over usury.

K. Allen Lovell, contra.—There is no uncertainty in the amount

of the present note, such as should destroy its negotiability. It is not at all analogous to any of the cases referred to by the other side. In all those cases extrinsic evidence was required to establish the amount due on the notes. This is the uncertainty that destroys negotiability. Here the amount is apparent on the face of the instrument, and needs no such evidence to fix it. The Pennsylvania cases relied on are also distinguishable on other grounds. In *Patterson* v. *Poindexter*, the instrument sued on contained no express promise to pay; whilst the instruments in *Overton* v. *Tyler*, and *Sweeney* v. *Thickstun*, contained warrants of attorney. In the latter case, there was also a collection-fee clause in the note; but the court carefully based their judgment upon the fact that the warrant of attorney rendered the note non-negotiable.

In Illinois a promissory note containing a collection clause somewhat similar to the present was held to possess all the requisites of a valid promissory note: *Nickerson* v. *Sheldon*, 33 Ill. 372–4.

The tendency of courts has recently been towards giving a liberal construction to instruments in determining the question of their negotiability: *Zimmerman* v. *Anderson*, 17 P. F. Smith 421; *Hodges* v. *Shuler*, 22 N. Y. 114.

The endorsement of a note creates a conditional contract by the endorser to pay the holder the sum which the maker or preceding endorsers should have paid, with such damages as the law allows: Byles on Bills, pp. 3, 146–7; Story on Bills, § 107; Edwards on Bills, § 288 (2d ed.).

Woods, therefore, in endorsing the present note, became liable as well for the collection-fee as for the face of the note. His assumption that the case is similar to that of an endorser of a note waiving the exemption law, is erroneous, that being the waiver of a *personal right* by the maker, and consequently not binding on the endorser.

The opinion of the court was delivered by

SHARSWOOD, J.—It is a necessary quality of negotiable paper that it should be simple, certain, unconditional—not subject to any contingency. It would be a mere affectation of learning to cite the elementary treatises and the decided cases which have established this principle. It is very important to the commercial community that it should be maintained in all its rigor. Applying it to the note sued upon in this case, we are of opinion that it violates this rule. If it had been made payable at sixty days with 5 per cent., it would have been objectionable as usurious on its face. It

would not, however, on that account have invalidated the note or destroyed its negotiability. A negotiable note may be made payable with interest from its date, and, if more than lawful interest is stipulated for, it does not, in Pennsylvania, make the contract void, but only the usury. Hence such a note is sufficiently certain. It is payable at maturity with lawful interest. But in the paper now in question there enters as to the amount an undoubted element of uncertainty. It is a mistake to suppose that, if the note was unpaid at maturity, the five per cent. would be payable to the holder by the parties. It must go into the hands of an attorney for collection. It is not a sum necessarily payable. The phrase "collection-fee" necessarily implies this. Not only so, but this amount of per centage cannot be arbitrarily determined by the parties. It must be only what would be a reasonable compensation to an attorney for collection. This in reason and the usage of the legal profession depends upon the amount of the note. Five per cent. would probably be considered by a jury as a reasonable compensation upon the collection of a note of $377. But if it were $3000 they would probably think otherwise. And certainly so if it were $30,000.

Now then can this note be said to be certain as to its amount, or that amount unaffected by any contingency? Interest and costs of protest after non-payment at maturity are necessary legal incidents of the contract, and the insertion of them in the body of the note would not affect its negotiability.

Neither does a clause waiving exemption, for that in no way touches the simplicity and certainty of the paper. But a collateral agreement, as here, depending, too, as it does upon its reasonableness to be determined by the verdict of a jury, is entirely different. It may be well characterized, like an agreement to confess a judgment was by Chief Justice GIBSON, as "luggage," which negotiable paper, riding as it does on the wings of the wind, is not a courier able to carry.

If this collateral agreement may be introduced with impunity, what may not be? It is the first step in the wrong direction which costs. These instruments may come to be lumbered up with all sorts of stipulations and all sorts of difficulties—contentions and litigation result. It is the best rule, *obsta principiis.*

Judgment reversed.

The particular point involved in the foregoing case is of very recent appearance in litigation, and the decisions upon it are at variance to a degree much to be regretted, upon a subject where uniformity is so especially desirable.

In *Sweeney* v. *Thickstun*, 77 Penna. St. 131, the note sued on contained a clause, that in case of non-payment at maturity, five per cent. collection fees should be added; but the case was argued and decided upon the effect of a warrant of attorney to confess judgment, also contained in the note; and as it was held that the negotiability of the note was destroyed by the warrant, the present point, although involved in the case, was not touched by the court. The principal case, however, in deciding the note not negotiable for want of certainty in the sum payable, follows logically the drift of the prior decisions in Pennsylvania.

The Supreme Court of Missouri also reached the same conclusion in *First National Bank of Trenton* v. *Gay*, 63 Mo. 33 (1876). In that case the words were, "If not paid at maturity, and the same is placed in the hands of an attorney for collection, we agree and promise to pay an additional sum of ten per cent. as attorney's fees." The court held that any contingency in the sum payable destroyed negotiability, and that the maxim *id certum est quod certum reddi potest* was not allowed, in the case of negotiable paper, to supply any lack of certainty in the statement in the note itself of the sum payable, quoting *Ayrey* v. *Fearnsides*, 4 M. & W. 168; *Smith* v. *Nightingale*, 2 Starkie 375; *Bolton* v. *Dugdale*, 4 B. & Ad. 619; *Clark* v. *Perceval*, 2 Id. 660; *Read* v. *McNulty*, 12 Rich. Law 445.

This decision was again affirmed in *Samstag* v. *Conly et al.*, 64 Mo. 476.

On the other hand, however, such notes have been held negotiable in several of the states.

In *Houghton* v. *Francis*, 29 Ill. 244 (1862), the note sued on contained the words, "If not paid when due, if called for, ten per cent. interest till paid;" and it was held that the note was not affected thereby, CATON, C. J., saying: "If not paid when due, upon the special call of the payee, then the makers agree to pay ten per cent. interest till paid. This does not make the payment of the note conditional. The promise to pay $275 six months from date is absolute."

Stipulations for the payment of interest stand upon a somewhat different ground from stipulations for other special payments, as observed by SHARSWOOD, J., in the principal case. The precise point now under consideration did not therefore arise in *Houghton* v. *Francis;* but we have thought it well to quote the language of CATON, C. J., as it contains the germ of the argument upon which all the cases which sustain the negotiability of notes with such clauses have been rested.

The earliest express decision of the point that we have found is in *Nickerson* v. *Sheldon*, 33 Ill. 372 (1864), where the words were, "If not paid without suit, to pay ten dollars in addition for attorney's fees." There was a special count on the note as a promissory note for its face amount, but not including the additional ten dollars, and also common counts. The defendant having demurred, judgment was given against him for the amount of the note without the attorney's fee, and this judgment was affirmed by the Supreme Court, referring to *Houghton* v. *Francis*, already discussed.

In *Sperry* v. *Horr*, 32 Iowa 184 (1871), the words were "if not paid when due and suit is brought thereon, I hereby agree to pay collection and attorney fees therefor," and in delivering judgment, BECK, J., said, "The sum payable by the terms of this note is fixed and certain; it is subject to no increase or diminution. When it matured no inquiry was necessary to be made as to facts not apparent on the face of the note, in order to fix the amount due; recovery could have been had upon the note itself without other evidence. The agreement for the pay-

ment of attorney fees in no sense increased the amount of money which was payable when the note fell due, and we are unable to see that it rendered that amount uncertain in the least degree. It simply imposed an additional liability in case suit should be brought, and such liability did not become absolute until action was instituted. This agreement relates rather to the remedy upon the note, if a legal remedy be pursued to enforce its collection, than to the sum which the maker is bound to pay. It is not different in its character from a cognovit which when attached to promissory notes does not destroy their negotiability."

So in *Sherman* v. *Pyle*, 35 Ind. 103 (1871), it is said by WORDEN, J., "The note if paid at maturity or after maturity but before suit brought thereon is for a sum certain. * * * In the commercial world commercial paper is expected to be paid promptly at maturity. The stipulation for the payment of attorney's fees could have no force except upon a violation of his contract by the defendant."

To the same effect are the decisions in Louisiana, *Dietrich* v. *Bayhi et al.*, 23 La. Ann. 767 (1871); Kentucky, *Gaar* v. *Louisville Banking Co.*, 11 Bush 180 (1876); and Kansas, *Seaton* v. *Scoville et al.*, Supreme Court, July Term 1877, not yet reported, all holding that collection-fee clauses do not destroy the negotiability of notes because they do not make the sum payable at maturity uncertain, but only impose an additional penalty in case of breach of the contract at the time appointed for performance.

It may be noticed that in the Pennsylvania and Missouri cases the sums payable were held uncertain as well as contingent, although the stipulation was for the payment of a definite and precise collection-fee, to wit, five and ten per cent. of the amounts of the notes respectively, while in some of the other cases (as, *e. g.*, *Sperry* v. *Horr*, and *Gaar* v. *Louisville Banking Co.*), the agreement was only to pay "collection" or "reasonable collection" fees, yet the latter were held not to make the sum payable sufficiently uncertain to destroy the negotiability of the notes. If the view intimated by Judge SHARSWOOD, in the principal case, should prevail, viz., that five per cent., though specified absolutely, is not to be taken as liquidated damages, but only as a penalty to secure a reasonable collection-fee, the difference in the language would be unimportant, but the fact that the more indefinite form of agreement has been held not to impair the certainty of the sum payable, is an indication of the wide divergence between the two lines of decision.

How far the courts, which sustain the negotiability of such notes, may be willing to go upon this point does not yet appear, but it is noticeable as indicating the caution of counsel in treading a new path that in nearly if not quite all of the cases, the plaintiffs preferred to ask for judgment for the face of the note waiving the collection-fee.

J. T. M.

Supreme Court of Wisconsin.

CATHARINE DUNBAR *v.* J. K. GLENN ET AL.

The owner of any peculiar natural product (as the water of a mineral spring), which has acquired reputation and mercantile value through his industry, sagacity and enterprise, is entitled, like the manufacturer of artificial products, to have his original trade-mark protected.

Where a particular word, or combination of words, used as a trade-mark, by